Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16350/2013

THE IMMIGRATION ACTS

Heard at Belfast	**Decision & Reasons**
On 26 June 2015	**Promulgated**
	On 28 September 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER - RABAT

Appellant

and

OUAFAA SALBAOUI

Respondent

Representation:

For the Appellant: Mr M Matthews, Home Office Presenting Officer
For the Respondent: Mr B Scullion, Solicitor

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer ("the ECO"). However, for ease of reference I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Morocco born on 19 November 1980. On 12 April 2013 she made an application for entry clearance as a spouse. That application was refused by the ECO in a decision dated 28 June 2013. With reference to Appendix FM the ECO concluded that there was a lack of

clarity surrounding the sponsor's marital status. The ECO was not satisfied that under UK law the sponsor was free to contract a marriage to the appellant. Thus, there were doubts as to the validity of the marriage. The application was refused with reference to paragraphs EC-P.1.1(d) and E-ECP.2.7 of Appendix FM.

3. The appellant's appeal against that decision came before First-tier Tribunal Judge S. Gillespie on 25 September 2014. He dismissed the appeal under the Immigration Rules but allowed it under Article 8 of the ECHR.

4. In his determination Judge Gillespie noted at [6] two matters that arose post-decision. The first was that the sponsor's first marriage had apparently been dissolved according to a divorce decree in the Family Division of the city of Kacem in Morocco on 8 July 2014. The second was that the appellant had given birth to a daughter, A, in Belfast on 24 November 2013. Her daughter was granted a British passport on 28 January 2014.

5. Judge Gillespie referred to evidence of divorce proceedings between the sponsor and his first wife in France, although the evidence did not establish that those divorce proceedings had in fact been brought to a conclusion.

6. At [13], having considered the documents in relation to the Moroccan divorce proceedings the judge ultimately concluded that the sponsor's first marriage has been dissolved. However, at [14] he also referred to the fact that the appellant and the sponsor purported to contract a marriage on 21 May 2011, before the dissolution of the sponsor's first marriage. Thus, it was found that the appellant is not able to satisfy the Immigration Rules because the sponsor was still married to his first wife at the time of the appellant's application.

7. Furthermore, it was recognised by the First-tier Judge that because the divorce post-dated the ECO's decision, that evidence could not be taken into account under the Immigration Rules, in respect of which the appellant was unable to succeed.

8. He then went on to consider Article 8 on a freestanding basis, citing the decision in *Secretary of State for the Home Department v Hayat* [2012] EWCA Civ 1054. He stated that the principles in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 are not confined to settlement cases, but that unless the likelihood of being granted entry clearance is very strong, *Chikwamba* does not come into play.

9. At [16] it was concluded that the sponsor had been separated from his wife and daughter since shortly after his daughter's birth, apart from when he visited them in Morocco. He referred to the sponsor having indefinite leave to remain and carrying on a business. He found that there would be a strong likelihood of the appellant being able to satisfy the ECO on a fresh application that the sponsor's first marriage was dissolved, although stating that there was still an issue as to whether the 2011 marriage was valid given the later dissolution. At [17], referring to the "interests" of the

appellant's daughter who he found was going to be separated from her father "for many more months", it was concluded that that separation was not in the child's "interests". Thus, he concluded that continued separation was an unjustified interference with the Article 8 rights of the family, and in particular the child.

The grounds and submissions

10. The respondent's grounds assert that the First-tier Judge misapplied the *Chikwamba* principle in that this was an application for entry clearance where the appellant would not have to leave the UK to make a fresh application. Thus, there would be no disruption to the status quo.

11. In addition, the First-tier Judge's decision fails to take into account that the child is a British citizen and would be entitled to enter the UK at any time to join her father should the family wish.

12. Furthermore, the conclusion that the appellant's daughter is going to be separated from her father for many months is not supported by any reasons with reference to any evidence before the First-tier Tribunal. It is asserted in the grounds that as a matter of fact 93% of settlement applications from Rabat are concluded within 60 days. Furthermore, the decision fails to take into account that the sponsor went to Morocco every two months to see his wife and child, as recorded at [11] of the determination.

13. Finally, it is asserted that the First-tier Judge's decision in effect applies Article 8 as a general dispensing power where the original application failed for want of a valid marriage.

14. In submissions Mr Matthews relied on those grounds. More particularly, he submitted that the First-tier Judge had wrongly taken into account matters which had arisen after the date of the decision, whereas the appeal was governed by Section 85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). At the date of the decision on 28 June 2013 their child had not been born and neither had their divorce taken place. Even under Article 8, the decision in *AS (Somalia) v Secretary of State for the Home Department* [2009] UKHL 32 applies to prevent reliance on evidence which is not evidence of the circumstances obtaining at the date of the decision.

15. Reliance on *Hayat* and *Chikwamba* was misguided, in that the principle in those cases does not apply to entry clearance appeals. The remedy for a person in the appellant's situation is to reapply under the Rules.

16. On behalf of the appellant Mr Scullion relied on the skeleton argument. Although the appellant's child was born after the decision, the appellant was pregnant at the time of the decision. The sponsor would even now be able to give evidence as to how the separation from his wife and child has affected his life. He is unable to make a further application because he is required to pay the bill for his child's birth.

17. The appellant and the sponsor have now remarried. Although the divorce and remarriage took place after the decision, the decision in *Chikwamba* does apply. As was stated in that case, the facts risk "elevating policy to dogma".

My conclusions

18. The First-tier Judge recognised that the appellant was not able to succeed under the Immigration Rules having regard to the issue in relation to the validity of the marriage between the appellant and the sponsor. At [13] he expressed his agreement with the submissions on behalf of the respondent that for that reason the appellant could not succeed in his appeal under the Rules.

19. However, I am satisfied that the First-tier Judge did fall into error in taking into account the fact of the birth of the appellant's child, considering that as a relevant factor under Article 8 of the ECHR.

20. I do not consider that in all cases the fact of an appellant expecting a child would always be irrelevant when considering s.85A of the 2002 Act. However in this case, at the date of the decision, assuming the child was born to term, the appellant would have been about four months pregnant at the date of the decision. The decision was taken about two and a half months after the application. Aside from the fact that the ECO was not aware of the appellant's pregnancy and there is nothing to indicate that the appellant drew it to the ECO's attention, I cannot see how on the facts of this appeal A's birth five months after the date of the decision could be said to be relevant to the circumstances appertaining at the time of the decision. In as much as under the Immigration Rules the judge was prevented from taking that fact into account, following *AS (Somalia)* he was prevented from taking it into account under Article 8 of the ECHR. The restriction applied as much to the Article 8 ground of appeal as it did to the appeal under the Immigration Rules.

21. The same applies in terms of the sponsor's divorce, which only appears to have been finalised in July 2014, over a year after the date of the decision.

22. Furthermore, I agree with the submission made on behalf of the respondent to the effect that the principle in *Chikwamba* does not apply to entry clearance appeals. The point in *Chikwamba*, as further explained in *Hayat* concerns the requirement, purely on a procedural basis, for an appellant in the UK to leave the UK simply to apply for entry clearance from abroad. In this case the appellant is not in the UK and is seeking entry clearance. The principle has no application to such a case. It is not simply a procedural requirement for the appellant to make an application for entry clearance; she needs to satisfy the Immigration Rules.

23. Although at [16] the judge concluded that there was a "strong likelihood" of the appellant being able to satisfy the ECO on a fresh application that her husband's first marriage was dissolved, that says nothing about the other requirements of the Immigration Rules.

24. Furthermore, there was no evidential foundation for the judge's conclusion that the appellant's daughter would be separated from her father "for many more months".

25. In these circumstances, I am satisfied that the First-tier Judge erred in law. The errors of law are such as to require the decision to be set aside.

26. In proceeding to re-make the decision, there is no reason to do anything other than re-make the decision on the basis of the evidence that was before the First-tier Tribunal, or more particularly, the evidence that was before the First-tier Tribunal as it related to the circumstances obtaining at the date of the decision. As I have already indicated, neither the fact of the birth of the appellant's child, nor the fact of the divorce between the sponsor and first wife (or, as I was informed at the hearing, the appellant and the sponsor's remarriage) are relevant in this appeal.

27. I note what is said in the appellant's skeleton argument at [9] about the medical report of Dr Carole Cairns in relation to the appellant's daughter 'A'. Although the skeleton argument suggests that she has been diagnosed with sickle cell disease and beta thalassaemia, in actual fact the report states that she is a carrier for those conditions, albeit that this will understandably be very worrying for both parents. However, again this is evidence which post-dates the decision and is not evidence of the circumstances obtaining at that time.

28. Notwithstanding what is advanced in the skeleton argument about the circumstances as they are now; the illness of A, the sponsor's and the appellant's marital status or the effect of separation on the family, this is not evidence that can be taken into account.

29. Similarly, despite the arguments advanced in terms of the applicability of *Chikwamba*, the principle in that case has no application to the circumstances of this appeal.

30. The appellant was not at the date of the decision able to meet the requirements of the Immigration Rules, as set out in the respondent's decision refusing entry clearance. The only outcome is for this appeal to be dismissed both under the Rules and with reference to Article 8 of the ECHR.

Decision

31. The decision of the First-tier Tribunal involved the making of an error on a point of law. The First-tier Tribunal's decision is set aside and the appeal is dismissed under the Immigration Rules and with reference to Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek 22/09/15